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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 372

PAUL GINSBURG, Petitioner

v.

HON. PHILIP L. SULLIVAN, Judge of the United States District Court for the Northern District of Illinois, Eastern Division, and HON. ROY H. JOHNSON, Clerk of the United States District Court for the Northern District of Illinois, Eastern Division

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND APPENDIX

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INDEX TO PETITION

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statement	3
Reasons for Allowance of the Writ	7
Conclusion	12

INDEX TO APPENDIX

Petition for Writs of Mandamus, No. 12363	1
Order Denying Petition	12
Petition for Writs of Mandamus, No. 12365	13
Order Denying Petition	25
Clerk's Letter	25
Transcript of District Court Proceedings	27

TABLE OF AUTHORITIES

CASES

Carroll v. Local No. 269 I.B.E.W., 31 A. 2d 223	8
Copeland v. General Motors Corp., 199 F. 2d 566	10
DuPont v. U. S. Camo Corp. et al., 19 F. R. D. 495	9
Foltz v. Moore-McCormack Lines, Inc., 19 F.R.D. 301	7
La Buy, United States District Judge, v. Howes Leather Co., Inc., et al., 352 U. S. 249	11
Lasdon v. Hallihan, 36 N. E. 2d 227	8
People v. Love, 298 Ill. 304, 131 N. E. 809	8
Saper v. Hague, 186 F. 2d 592	9
Sorenson v. Jacobson, 232 P. 2d 332	8
United States v. Shotwell Manufacturing Co., Harold E. Sullivan, et al., 355 U. S. 233	10, 12
Wilson, Inc. v. F. C. C., 170 F. 2d 793	8

FEDERAL RULES OF CIVIL PROCEDURE

Rule 15 (a)	9
Rule 79 (a)	7

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Paul Ginsburg, petitioner, respectfully prays that a writ of certiorari issue in the above captioned case directed to the United States Court of Appeals for the Seventh Circuit to review its Orders dated and entered June 25, 1958 (App. 12, 25).

OPINIONS BELOW

There are no opinions below. Neither the United States District Court for the Northern District of Illinois, Eastern Division, nor the United States Court of Appeals for the Seventh Circuit delivered any opinions. Peti-

tioner, however, calls this Honorable Court's attention to his action against John D. Black, et al., out of which the instant matter has arisen, which was before this Court on petition for writ of certiorari at No. 788 October Term, 1956.

JURISDICTION

The unreported orders of the court of appeals denying the petitions for writs of mandamus (App. 12, 25) sought to be reviewed were dated and entered June 25, 1958. Therefore, the expiration date for the filing of this petition for writ of certiorari is September 23, 1958.

The jurisdiction of this Honorable Court is invoked under 28 U.S.C. Section 1254 (1); and the general supervisory powers of this Court over lower Federal Courts.

QUESTIONS PRESENTED

1. May a clerk of a District Court withhold or exclude from the Record in a civil action pleadings duly lodged by a litigant therein in violation of Rule 79(a) of the Federal Rules of Civil Procedure? Affirmed.

2. When the clerk of a District Court withholds or excludes from the Record in a civil action pleadings duly lodged by a litigant therein, does that not interfere with said litigant's constitutional right to due process of law? Negatived.

3. May a District Court Judge make off-the-record decisions, in effect foreclosing a litigant's right to a record decision on the merits of the pleadings presented to said Judge? Affirmed.

4. When the Court of Appeals refuses (a) to order a District Court clerk to file and make appropriate Docket Entries of pleadings duly lodged by a litigant; and (b) to order a District Court Judge to make record decisions on the merits of pleadings presented to him pursuant to the Federal Rules of Civil Procedure and the applicable law; has it not so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by the District Court, as to call for an exercise of this Court's power of supervision? Negatived.

STATEMENT

Petitioner, Paul Ginsburg, is a citizen and resident of Pittsburgh, Pennsylvania, and a member in good standing of the bar of various Courts including this Honorable Court (App. 1, 13).

Respondent Hon. Philip L. Sullivan is a Judge of the United States District Court for the Northern District of Illinois, Eastern Division, and respondent Roy H. Johnson is the Clerk of that Court (App. 1, 13).

In the said District Court your petitioner is the plaintiff in Civil Action No. 54C681, wherein John D. Black, et al., are the defendants (App. 1-2, 13-14). That action, with jurisdiction based upon diversity of citizenship and a sum in excess of $500,000.00 exclusive of interest and costs, is a suit for damages for unlawful publications of admittedly untrue and unprovable matters, libelous per se concerning petitioner, and intended to injure him professionally and personally. Respondent Judge Sullivan ordered summary judgment for defendants therein on the ground of absolute privilege, which was impossible

legally because the doctrine of absolute privilege can be applied only to matter contained in court pleadings, whereas the publications complained of below were admittedly made in disciplinary proceedings instituted by petitioner against said defendants below in the American Bar Association (App. 4, 16). *On appeal,* the judgment was affirmed on a different ground, lack of publication. Therefore, the court of appeals in effect overruled judgment on the ground of absolute privilege and granted judgment on a ground not before it. Furthermore, the affirmance did violence to the record because the defendants below had admitted publication. *On certiorari,* this Court at No. 788 October Term, 1956, denied review to petitioner, which does not imply approval of the judgment sought to be reviewed or of its supporting opinion (App. 5, 17).

The last pleading filed in this Court at No. 788 October Term, 1956, was petitioner's Motion for Leave to File Supplemental Record and Second Petition for Rehearing Out of Term Time; and, in the alternative, Motion to Remand, denied April 28, 1958 (App. 5, 17, 24). That pleading had appended to it in support thereof petitioner's District Court Motion to Vacate Summary Judgment Order and to Enter Order of Disqualification, which Judge Sullivan failed to hear and which was denied by District Judge Igoe who lacked jurisdiction; and petitioner's Petition for Writ of Mandamus to secure consideration thereof on the merits, which the court of appeals at No. 12256 denied February 18, 1958. Appended hereto (App. 25-26) is the clerk's letter enclosing certified copy thereof addressed to Mr. Robert Tieken, United States Attorney, 450 U.S. Court House, Chicago 4, Illinois, in-

dicating his connection therewith as alleged and his interest in the outcome. At the time when Mr. Tieken became United States Attorney, he was a partner of the defendants.

On May 14, 1958, petitioner lodged with respondent Roy H. Johnson, Clerk, for filing, his Motion for Leave to Amend Complaint and the annexed Amendment to the Complaint with notice of presentation thereof to respondent Judge Sullivan on June 13, 1958 (App. 5, 10-11). *On May 29 1958,* petitioner lodged with respondent Roy H. Johnson, Clerk, for filing, his Motion for Change of Venue with notice of presentation thereof to respondent Judge Sullivan on June 12, 1958 (App. 18, 23-24). Nevertheless, the respondent Clerk failed and refused to file the said pleadings and make appropriate docket entries of them (App. 5, 18).

On June 12, 1958, petitioner-plaintiff and opposing counsel on notice appeared before respondent Judge Sullivan (App. 6, 18, 27), at which time the said motions were presented to Judge Sullivan, who refused to consider the motions on the merits or even to enter orders thereon. Instead, respondent Judge Sullivan stated from the bench that there would be "no orders" on the motions (App. 6, 19, 29, 30), and called the next case. *Consequently, there is no record in the District Court that the motions were filed, presented or passed upon, and no record as a basis for appeal.*

In the court of appeals, averring that your petitioner is without other specific and adequate relief (App. 9), he lodged a Petition for Writ of Mandamus against the respondents herein at No. 12363 (App. 1), to secure the filing and docketing of said notice and motion for leave

to amend complaint and the annexed Amendment to the Complaint, and an Order that the motion be granted and the Amendment to the Complaint be filed with notice to defendants to plead thereto within twenty days (App. 9); and, averring that your petitioner is without other specific and adequate remedy at law (App. 21), he also lodged a Petition for Writs of Mandamus against these respondents at No. 12365 (App. 13) to secure the filing and docketing of the Notice and Motion for Leave to Amend Complaint and the annexed Amendment to the Complaint, as well as the Notice and Motion for Change of Venue, and an Order that a Hearing be set on the Motion for Change of Venue (App. 21). On June 25, 1958, the court of appeals entered Orders denying both petitions without the issuance of a rule (App. 12, 25), to review which Orders petitioner prays that this Court issue a writ of certiorari.

REASONS FOR ALLOWANCE OF THE WRIT

1. The Clerk of a District Court May Not Withhold or Exclude From the Record in a Civil Action Pleadings Duly Lodged by a Litigant Therein.

The Clerk of a District Court, like the Judges thereof, is bound by the Federal Rules of Civil Procedure as by an Act of Congress. See *Foltz v. Moore-McCormack Lines, Inc.*, 19 F.R.D. 301 (1956), wherein Judge Weinfeld of the District Court for the Southern District of New York held that Congress gave the Rules the force and effect of a statute (cf. 28 U.S.C., sec. 2072). When petitioner's pleadings in the district court were lodged with respondent Roy H. Johnson, Clerk, the pleadings should have been filed and docketed forthwith pursuant to Rule 79(a) which provides that he "shall" do so. By withholding and excluding pleadings from the record, the Clerk could usurp the function of the Court by determining in advance of consideration by the court that the pleadings are not entitled to consideration and accordingly they are denied. Furthermore, as in the instant case, such a Clerk could deny a litigant a record basis for appeal, and even the right to litigate. Petitioner respectfully submits that his right to have his pleadings filed and docketed in a Court of record is elementary.

2. When the Clerk of a District Court Withholds or Excludes From the Record Pleadings Duly Lodged by a Litigant, He Has Interfered With Said Litigant's Constitutional Right to Due Process of Law.

The record in the district court makes it plain that petitioner-plaintiff was litigating in respect to his professional and personal standing and property. Peti-

tioner's rights therein are guaranteed by the Constitution and laws of the United States, including his right to litigate with due process of law to protect and enforce said rights. In *Carroll v. Local No. 269 I.B.E.W.* (1943), 31 A2d 223, the Court stated (pp. 224-5): "It is not inappropriate, however, to remark that the right to earn a livelihood is a property right which is guaranteed in our country by the fifth and fourteenth amendments of the federal constitution . . .". In *Lasdon v. Hallihan*, 36 N.E. 2d 227 (1941), the Court stated (p. 231): "The right to follow the professions is one of the fundamental rights of citizenship. A person's business, profession or occupation is property within the meaning of the constitutional provision as to due process of law and is also included in the right to liberty and the pursuit of happiness". In *People v. Love*, 298 Ill. 304, 131 N. E. 809, the court held that "the right to pursue a lawful calling, business or profession, cannot be arbitrarily taken away . . .". In *Wilson, Inc., v. F. C. C.*, 170 F2d 793 (1948), the Court stated (p. 798): "A broadcasting license is a thing of value to the person to whom it is issued and a business conducted under it may be the subject of injury. We set forth in the margin quotations from decisions of the Supreme Court which support these statements . . .". In *Sorensen v. Jacobson*, 232 P2d 332 (1951), the Court stated (p. 336): "Under the due process provision, no citizen shall arbitrarily be deprived of his property. This the executive, legislative or the courts cannot do or authorize to be done. Due process of law extends to every case which may deprive a citizen of property. It requires an orderly proceeding adapted to the nature of the case and in accordance with law, in which the person has an opportunity

before the taking to be heard, and to defend, protect and enforce his rights. Before the property of a person can be taken by another and converted to his own use, a hearing or opportunity to be heard is absolutely essential. We cannot conceive of due process of law without this". Therefore, the respondent Clerk's actions were unlawful, and the court of appeals erroneously sanctioned them.

3. Under the Federal Rules of Civil Procedure and the Applicable Law a District Court Judge Is Powerless to Make Off-The-Record Decisions, in Effect Foreclosing a Litigant's Right to a Record Decision on the Merits of the Pleadings Presented to Said Judge.

There was nothing unusual or unprecedented about the motions your petitioner presented to respondent Judge Sullivan. They were normal pleadings properly presented in the ordinary course of judicial proceedings, pursuant to the Federal Rules of Civil Procedure and the applicable law. Plaintiff-petitioner's right to amend the complaint below was absolute under Rule 15 (a) and the consent of defendants and leave of court were not even required. The said Amendment to the Complaint conformed to the Opinion of the court of appeals and petitioner was entitled thereto even after judgment. In *Saper v. Hague,* 186 F2d 592 (1951) 2 CCA, the Court held that even a motion to conform a pleading to proof may be made at any time, even after judgment. In *DuPont v. U. S. Cama Corp., et al.,* 19 F. R. D. 495 (1956), W. D. Mo., the Court held that there is no limitation on time to amend, only due diligence being required; and generally leave is granted freely where justice requires and particularly when the amendment is directed to

clarification of the issues. In *Copeland v. General Motors Corp.*, 199 F2d 566 (1952) 5 CCA, the Court held that a party may amend freely to secure a determination on merits rather than on technicalities; and there is no laches where amendment is tendered shortly after awaited decision of issues by the Supreme Court. In view of the foregoing and the record below, respondent Judge Sullivan had no alternative but to grant petitioner's Motion to Amend Complaint and to require the defendants below to plead to the Amendment to the Complaint within twenty days. Judge Sullivan's refusal even to enter an Order thereon supports petitioner's prior motion that Judge Sullivan enter an Order of his disqualification because of the failure of Judge Sullivan and the defendants below to disclose to plaintiff-petitioner their relationship arising out of the defendants' representation of the interests of Judge Sullivan's brother, Harold E. Sullivan, Esquire, in connection with his criminal convictions in the concurrent course of the case of *United States v. Shotwell Manufacturing Co., Harold E. Sullivan, et al.*, 355 U. S. 233 (1957), and up to the present time in that case and as a defendant in other criminal cases.

The subject of respondent Judge Sullivan's disqualification as aforesaid was the primary reason in support of petitioner's Motion for Change of Venue, on which Judge Sullivan refused to enter an Order. Judge Sullivan's off-the-record decisions below which in effect foreclose your petitioner's right to record decisions on the merits as well as petitioner's right to litigate against the attorneys for the Judge's brother, speak for themselves. Furthermore, the record leaves no doubt that the court of appeals knew exactly what it was sanction-

ing. Can any reasonable man criticize your petitioner's motion to get his case out of such a District and Circuit? Could any Judge who acknowledges that he is bound by the Federal Rules of Civil Procedure and the applicable law deny petitioner a Hearing on such a motion?

4. The Court of Appeals Has So Far Departed From the Accepted and Usual Course of Judicial Proceedings, and So Far Sanctioned Such a Departure by the District Court, as to Call for an Exercise of This Court's Power of Supervision.

This consideration governing review on certiorari is plainly set forth in paragraph 1 (b) of Rule 19 of this Court's Rules. Furthermore, petitioner cited to the court of appeals (App. 8, 20) this Honorable Court's decision in the case from its own court and the same District, in *La Buy, United States District Judge, v. Howes Leather Co., Inc., et al.*, 352 U. S. 249 (1957), affirming 226 F2d 703 (7 CCA), wherein Mr. Justice Clark in the majority opinion (pp. 259-260) stated: "Supervisory control of the District Courts by the Courts of Appeals is necessary to proper judicial administration in the Federal System; and the All Writs Act, 28 U. S. C. sec. 1651 (a), confers on the Courts of Appeals the discretionary power to issue extraordinary writs in exceptional circumstances such as exist herein". What circumstances could be more exceptional than the ones that exist herein where a Clerk withholds and excludes from the record pleadings duly lodged for filing, denying the party his constitutional right to due process of law, and a Judge makes off-the-record decisions in effect foreclosing a litigant's right to litigate under the Federal Rules of Civil Procedure and the applicable law?

The court of appeals without justification erred in refusing to order the respondent Clerk to file and make appropriate Docket Entries of the pleadings petitioner lodged with him for filing; and in refusing to order respondent Judge Sullivan to make record decisions on the merits of petitioner's motions, compelling him to grant the motion to amend and require defendants below to plead to the Amendment to the Complaint within twenty days, and to set a Hearing on the Motion for Change of Venue. It is respectfully submitted that this Court should do so.

Conclusion

What has happened in the instant case in the Seventh Circuit at Chicago, and to a lesser degree in *U.S. v. Shotwell-Sullivan, supra*, and in other cases too numerous to mention, is frowned upon by many learned in the law as business as usual. It would not occur to those who are not learned in the law that what has happened to petitioner in Chicago has deprived him of federal constitutional and civil rights, including loss of profits of millions of dollars. The public as well as officialdom has been conditioned to harbor the false notion that the only deprivations of civil rights occur in the South and solely in connection with the right to vote and the right to attend an integrated school. As a matter of fact, there are daily deprivations of civil rights in the North, of a different type but nonetheless civil rights that are "guaranteed" as in the instant case. There simply is not any organization to protect and enforce such rights, because they are unpopular politically.

The instant petition, like any other, could be flatly denied on technical considerations and fail to receive

consideration in the interest of justice. However, the result could be an interpretation that the approval of the actions below is not local to Chicago, but national. This could backfire on the Federal Government of the North that has recently been critical of some State Governments of the South, and cause a legal obstruction of Justice. Our Federal Government was instrumental in persuading this Honorable Court last week to order immediate integration of public schools in Arkansas, in opposition to which that State is asserting its rights. Thus far our Federal Government anticipates litigious problems in the State Courts only. But, the denial of certiorari herein could cause more serious problems in Federal Court, wherein the Clerk could justifiably decide not to file and docket the Federal Government's pleadings and the Judge could justifiably make off-the-record decisions, all denying due process of law, the right to appeal and even the right to litigate. The fantastic but foreseeable result could effectuate a reversal of this Honorable Court's mandate by a District Court in Arkansas.

The District Court has not justified its existence. The Court of Appeals has not served its purpose. Will not this Honorable Court justify the existence of the District Court and compel the Court of Appeals to serve its purpose?

Respectfully submitted,

PAUL GINSBURG
Counsel for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PAUL GINSBURG, Petitioner,

v.

HON. PHILIP L. SULLIVAN, Judge of the United States District Court for the Northern District of Illinois, Eastern Division, and ROY H. JOHNSON, Clerk of the United States District Court for the Northern District of Illinois, Eastern Division.

No. 12363

Petition for Writs of Mandamus

To the Honorable, the Chief Judge and the Judges of said Court:

The petition of Paul Ginsburg respectfully represents:

1. Petitioner, Paul Ginsburg, is a citizen and resident of the City of Pittsburgh, County of Allegheny, Commonwealth of Pennsylvania; and is a member in good standing of the bar of the Supreme Court of the United States.

2. Respondent, Hon. Phillip L. Sullivan, is a Judge of the United States District Court for the Northern District of Illinois, Eastern Division, and Respondent Hon. Roy H. Johnson is the Clerk of the United States District Court for the Northern District of Illinois, Eastern Division, both within the jurisdiction of this Honorable Court.

3. In the said District Court at No. 54 C681 petitioner, as plaintiff, filed a civil action against John D.

Black, John C. Slade, Guy Allen Gladson, Edward G. Ince, Bryce L. Hamilton, Reuben A. Borsch, Douglas C. Moir, James D. Head, Gerard E. Greshorn, George W. Ott, Grier D. Patterson, Walter A. Wade, Thomas I. Underwood, Thomas A. Reynolds, Frank B. Gilmer, Robert McDougal, Jr., Albert W. Potts and William C. Mulligan, as defendants.

4. The said action below is a suit for damages brought by Paul Ginsburg, a lawyer of Pittsburgh, Pennsylvania, against the defendants, who are Chicago lawyers, for their unlawful publication of admittedly untrue and unprovable matters, libelous per se concerning plaintiff-petitioner, and intended to injure him professionally and personally. It appears that the said defendants were motivated to libel your petitioner on account of his exposing their fraud and imposition upon the State Court in Kentucky in the matter of the sale of 85% of the shares of stock of American Creosoting Company and subsidiaries by the Estate of Sallie A. Hert, Deceased.

5. Through their imposition and fraud upon the Court as aforesaid, the said defendants were enabled to obtain the shares of stock for their client, Alfred L. Kuehn, a co-trustee of the Estate, (through a corporation, as purchaser, which had been formed by Mr. Kuehn and his sons) at a price which was several millions of dollars below the real value. As a result, not only was the Trust Estate cheated out of millions of dollars, but also your petitioner and his client were wrongfully deprived of their opportunity to secure several millions of dollars in profits through purchase of the shares of stock.

6. The libelous matters complained of were published in the course of disciplinary proceedings before the American Bar Association brought by your petitioner against said defendants. Upon the filing of the complaint, the case was assigned to respondent Judge Philip L. Sullivan whose brother, and others, had been convicted in the same Court at No. 52 CR 143 on October 16, 1953, on charges of income tax evasion and sentenced to imprisonment and to pay fines. Notices of Appeal to this Honorable Court were filed on behalf of Harold E. Sullivan (Judge Sullivan's brother) and his co-defendants at Nos. 11108, 11109, 11110 and 11111.

7. Respondent, Hon. Philip L. Sullivan, set the pretrial conference in your petitioner's case for December 22, 1954, one week prior to which time the said defendants doing business as Winston, Strawn, Black & Towner appeared in this Honorable Court and filed a brief in the appeals in which Judge Sullivan's brother was involved which brief was for the benefit of all those defendants; made the principal argument for all said defendants in this Honorable Court; made the only argument on their behalf at No. 1 October Term, 1957, in the Supreme Court of the United States; and to this date are still representing their interests.

8. At no time in the course of your petitioner's case against the defendants doing business as Winston, Strawn, Black & Towner, did Judge Sullivan or the defendants disclose to petitioner their said relationship, which disclosure would have placed petitioner in position to seek respondent Judge Sullivan's removal for self-interest. On July 1, 1955, Judge Sullivan entered a Summary Order therein against your petitioner and in favor

of the defendants by applying the doctrine of absolute privilege. It is elementary that the doctrine of absolute privilege can never be applied legally to libelous matters unless they are published in court pleadings, and then the application is restricted. Therefore, Judge Sullivan's patently illegal application of the doctrine therein supports petitioner's charge of the Judge's self-interest, because the publications complained of were admittedly made in the course of proceedings before the American Bar Association, a voluntary association.

9. On your petitioner's appeal to this Honorable Court at No. 11595, this Court would not affirm on the ground of absolute privilege but did so on a different ground—lack of publication. (273 F.2d 790). In effect this Court reversed the application of the doctrine of absolute privilege, and then affirmed on a ground for which there was no record support, because not only had the defendants below admitted publication, but there had never been a hearing below on that issue. The only forum wherein to establish a record on which to base the said issue is the District Court. Appellate Courts are without facilities and jurisdiction to make a record on issues. See United States of America v. Shotwell Manufacturing Company, Harold E. Sullivan, et al., 355 U.S. 233 (December 16, 1957), where in the Supreme Court of the United States decided that the District Court is the only forum wherein to establish the record on issues, and in the absence of such record in the District Court, that particular issue cannot be the subject of an appeal in the Court of Appeals or of review in the Supreme Court. Furthermore, in support of the point that the jurisdiction of the Court of Appeals is exclusively appellate and that it is not the function of the Court of

Appeals to assume the powers of the District Court, See Ralston Purina Co. v. Novak, 111 F.2d, 631, Stephenson v. Equitable Life Assur. Soc. of U.S., 98 F. 2d 406, and Publicity Building Realty Corp., et al., v. Hannegan, et al., 139 F. 2d 583. Furthermore, the denial of certiorari by the Supreme Court at No. 788 October Term, 1956 (353 U.S. 911). "Does not imply approval of the decision for which review is sought or of its supporting opinion". See Elgin, Joliet & Eastern Rwy. Co. v. Gibson, 7 CCA 355 U.S. 897 (1957); citing Brown v. Allen, 344 U.S. 443. Your petitioner's last pleading filed in the Supreme Court in said matter was denied on April 28, 1958.

10. Promptly after the Supreme Court's denial of relief to petitioner, he served Notice upon defendants in the said action below before Respondent Judge Sullivan that he would present his Motion for Leave to Amend Complaint on June 13, 1958. The Notice of Motion, the Motion for Leave to Amend Complaint and the Amendment to the Complaint were lodged with Respondent Roy H. Johnson, Clerk, for filing on May 14, 1958 and are attached hereto, made part hereof and marked Exhibit A. Nevertheless, the respondent clerk did not mark them filed and did not make docket entries of them, but simply forwarded them to Respondent Judge Sullivan for disposition.

The Amendment was filed in strict compliance with the applicable law and Rule 15(a), which provides for the allowance of course of one amendment prior to trial, as a matter of right. It is evident herein that there has been no trial nor has there been a hearing on any issue except absolute privilege. Furthermore, the amendment

to the complaint conforms to the opinion of this Honorable Court which indicated that the publication was made by the defendants through and by the agency of the American Bar Association.

Under Rule 15, therefore, leave of court was not even required. The amendment was filed timely because under the Rules and the applicable law there is no limitation of time for amendments, the only requirement being due diligence; and the plaintiff could hardly have been more duly diligent because the amendment was filed within two weeks after notification of denial in the Supreme Court. Furthermore, such an amendment is allowable under the law at any time, even after judgment.

11. On June 12, 1958 your petitioner appeared before respondent Judge Sullivan to present the said Motion for Leave to Amend Complaint, Exhibit A hereof, as well as a Motion for Change of Venue and R. Lawrence Storms, Esquire, of Winston, Strawn, Smith & Patterson, record counsel for the defendants therein also appeared on Notice. Respondent Judge Sullivan stated from the bench that the Court no longer had jurisdiction and that he would not enter orders on the motions. Lodged herewith for the information of this Honorable Court is a transcript of the said proceedings before Respondent Judge Sullivan. This Court's attention is particularly directed to page 4 thereof whereon the following statement of Respondent Judge Sullivan appears: "THE COURT: No order on both motions; no jurisdiction."

12. It is elementary that Respondent Roy H. Johnson, Clerk, had no alternative upon receipt of the said

Notice and Motion but to mark them filed and to make docket entries of them in advance of forwarding them to Respondent Judge Sullivan. Prior to presentation of the said Motion to Respondent Judge Sullivan your petitioner requested the Respondent Clerk to mark the said Notice and Motion filed and to make docket entries of them, but he stated that he would do nothing until conferring with Respondent Judge Sullivan. After your petitioner's attempted presentation of the motion to Respondent Judge Sullivan he was notified by Respondent Clerk that Respondent Judge Sullivan orally ordered the Clerk not to mark the papers filed and not to make docket entries of them for lack of jurisdiction.

13. It is elementary that Respondent Judge Sullivan in refusing to consider or enter an order on petitioner's Motion for Leave to Amend Complaint and has acted in violation of the federal Rules of Civil Procedure and the applicable law. Under the rules he was bound to give full consideration to the motion and having done so, he was bound to enter an order thereon. District Court Judges are bound by the federal Rules of Civil procedure as by an Act of Congress. See Foltz v. Moore-McCormack Lines, Inc., 19 F. R. D. 301 (1956), wherein it was held analogously that the motion must be granted because Congress gave the federal Rules of Civil Procedure the force and effect of a statute (Cf. 28 U.S.C. sec. 2072).

14. Further support of petitioner's right to the said amendment is the following: A defense not presented by pleading or motion of defendant and not tried and not asserted by defendant to be in the case was not before the Courts of Appeals, DuPont v. Martin, 174 F.2d 602 (1949), 6 CCA and a defense that an order to

show cause was insufficient process, made for the first time in briefs in Court of Appeals, was too late; Carter v. Powell, 104 F.2d 428 (1939), 5 CCA, rehearing denied 104 F.2d 1012, certiorari denied 308 U.S. 611.

15. The respondent's failure to exercise his power under the Rules legally has subjected him to the supervisory control of this Honorable Court through the instant petition. Support for this contention is found in the case of LaBuy, United States District Judge, v. Howes Leather Co., Inc., et al., 352 U.S. 249 (1957), affirming 226 F.2d 703 (7 CCA), wherein the Supreme Court of the United States held in the majority opinion (pp. 259-260) by Mr. Justice Clark, "Supervisory control of the District Courts by the Courts of Appeals is necessary to proper judicial administration in the Federal system; and the All Writs Act, 28 U.S.C. sec. 1651(a), confers on the Courts of Appeals the discretionary power to issue extraordinary writs in exceptional circumstances such as exist herein."

16. It is respectfully submitted that just as respondent Judge Sullivan has subjected himself to the supervisory control of this Honorable Court, this Court's denial of the petition would likewise subject it to the Supreme Court's power of supervision as set forth in Rule 19 of the Supreme Court of the United States setting forth considerations governing review on certiorari, wherein paragraph 1(b) provides for certiorari where a court of appeals has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of the Supreme Court's power of supervision.

17. In view of the foregoing, it is respectfully submitted that respondent Roy H. Johnson, Clerk, should be directed to mark your petitioner's said Motion for Leave to Amend Complaint filed as of May 14, 1958 and to make a docket entry of it; and further, respondent Judge Sullivan should be directed to enter an order that the Motion for Leave to Amend Complaint be granted.

18. Your petitioner is without other specific and adequate relief.

WHEREFORE, petitioner prays that this Honorable Court grant a Rule directed against the respondent, Roy H. Johnson, to show cause why a Writ of Mandamus should not be issued directing him to mark plaintiff-petitioner's Notice and Motion For Leave to Amend Complaint and the annexed Amendment to the Complaint filed May 14, 1958, and to enter the appropriate Docket Entries thereof at Civil Action No. 54 C 681 in the United States District Court for the Northern District of Illinois, Eastern Division; and that this Honorable Court grant a Rule directed against the respondent, Philip L. Sullivan, to show cause why a Writ of Mandamus should not be issued directing him to grant plaintiff-petitioner's Motion for Leave to Amend Complaint, order the annexed Amendment to the Complaint filed with notice to the defendants to plead thereto within twenty days from the filing thereof at Civil Action No. 54 C 681 in the United States District Court for the Northern District of Illinois, Eastern Division.

S/ PAUL GINSBURG
Petitioner

AFFIDAVIT

Commonwealth of Pennsylvania
County of Allegheny } ss.:

Before me, a Notary Public in and for said County and State, personally appeared Paul Ginsburg, petitioner above named, who being duly sworn according to law deposes and says that the facts set forth in the foregoing petition are true and correct.

S/ PAUL GINSBURG

Sworn to and subscribed before me this 18th day of June, 1958.

S/ BINA B. ZEIDMAN

Bina M. Ziedman, Notary Public
Pittsburgh, Allegheny County
My Commission Expires February 5, 1959

EXHIBIT "A"

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

PAUL GINSBURG, Plaintiff,
v.
JOHN D. BLACK, ET AL., Defendants. } Civil Action No. 54 C 681

NOTICE OF MOTION

YOU ARE HEREBY NOTIFIED that on Friday, the 13th day of June, 1958, at the opening of Court in the forenoon, or as soon thereafter as plaintiff can be heard, in the United States Court House at Chicago, Illinois, plaintiff will appear in the Court Room assigned to Hon.

Philip L. Sullivan and, then and there, present to the said Judge the following:

MOTION FOR LEAVE TO AMEND COMPLAINT

Plaintiff moves the Court, pursuant to the federal Rules of Civil Procedure and the applicable law, for leave to file the annexed Amendment To The Complaint, with notice to the defendants to plead thereto within twenty days from the filing thereof.

S/ PAUL GINSBURG
Plaintiff

Dated: 13 May 1958

AMENDMENT TO THE COMPLAINT

Plaintiff hereby makes the following amendment to the Complaint.

The entire Complaint shall remain as originally filed and averred, and in addition thereto plaintiff hereby adds the following averment to be included in said Complaint:

17th. The aforesaid libels published of and concerning the plaintiff were published throughout the United States, particularly among members of the bar of the forty-eight states, by the defendants, their attorneys, agents, servants and employees, as well as through and by the agency of said American Bar Association.

S/ PAUL GINSBURG
Plaintiff

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago 10, Illinois

June 25, 1958

Before
Hon. Philip J. Finnegan,
Hon. John S. Hastings,
Hon. W. Lynn Parkinson.

PAUL GINSBURG		PETITION FOR
No. 12363	v.	WRIT OF
HON. PHILIP P. SULLIVAN, ET AL.		MANDAMUS

ORDER

The Court is of the opinion that the facts alleged and set forth in the petition filed June 20, 1958, do not justify a hearing; consequently we refuse to issue a rule to show cause why a writ of mandamus should not issue. Petition for writ of mandamus is hereby DENIED.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PAUL GINSBURG, Petitioner,

v.

HON. PHILIP L. SULLIVAN, Judge of the United States District Court for the Northern District of Illinois, Eastern Division, and HON. ROY H. JOHNSON, Clerk of the United States District Court for the Northern District of Illinois, Eastern Division.

No. 12365

Petition for Writs of Mandamus

To the Honorable, the Chief Judge and the Judges of said Court:

The petition of Paul Ginsburg respectfully represents:

1. Petitioner, Paul Ginsburg, is a citizen and resident of the City of Pittsburgh, County of Allegheny, Commonwealth of Pennsylvania; and is a member in good standing of the bar of the Supreme Court of the United States.

2. Respondent, Hon. Philip L. Sullivan, is a Judge of the United States District Court for the Northern District of Illinois, Eastern Division, and Respondent, Hon. Roy H. Johnson, is the Clerk of the United States District Court for the Northern District of Illinois, Eastern Division, both within the jurisdiction of this Honorable Court.

3. In the said District Court at No. 54 C 681 petitioner, as plaintiff, filed a civil action against John D.

Black, John C. Slade, Guy Allen Gladson, Edward G. Ince, Bryce L. Hamilton, Reuben A. Borsch, Douglas C. Moir, James D. Head, Gerard E. Grashorn, George W. Ott, Grier D. Patterson, Walter A. Wade, Thomas I. Underwood, Thomas A. Reynolds, Frank B. Gilmer, Robert McDougal, Jr., Albert W. Potts and William C. Mulligan, as defendants.

4. The said action below is a suit for damages brought by Paul Ginsburg, a lawyer of Pittsburgh, Pennsylvania, against the defendants, who are Chicago lawyers, for their unlawful publication of admittedly untrue and unprovable matters, libelous per se concerning plaintiff-petitioner, and intended to injure him professionally and personally. It appears that the said defendants were motivated to libel your petitioner on account of his exposing their fraud and imposition upon the State of Kentucky in the matter of the sale of 85% of the shares of stock of American Creosoting Company and subsidiaries by the Estate of Sallie A. Hart, Deceased.

5. Through their imposition and fraud upon the Court as aforesaid, the said defendants were enabled to obtain the shares of stock for their client, Alfred L. Kuehn, a co-trustee of the Estate (through a corporation, as purchaser, which had been formed by Mr. Kuehn and his sons) at a price which was several millions of dollars below the real value. As a result, not only was the Trust Estate cheated out of millions of dollars, but also your petitioner and his client were wrongfully deprived of their opportunity to secure several millions of dollars in profits through purchase of the shares of stock.

6. The libelous matters complained of were published in the course of disciplinary proceedings before the American Bar Association brought by your petitioner against said defendants. Upon the filing of the complaint, the case was assigned to respondent Judge Philip L. Sullivan whose brother, and others, had been convicted in the same Court at No. 52 CR 143 on October 16, 1953, on charges of Income tax evasion and sentenced to imprisonment and to pay fines. Notices of Appeal to this Honorable Court were filed on behalf of Harold E. Sullivan (Judge Sullivan's brother) and hs co-defendants at Nos. 11108, 11109, 11110 and 11111.

7. Respondent, Hon. Philip L. Sullivan, set the pre-trial conference in your petitioner's case for December 22, 1954, one week prior to which time the said defendants doing business as Winston, Strawn, Black & Towner appeared in this Honorable Court and filed a brief in the appeals in which Judge Sullivan's brother was involved which brief was for the benefit of all those defendants; made the principal argument for all said defendants in this Honorable Court; made the only argument on their behalf at No. 1 October Term, 1957, in the Supreme Court of the United States; and to this date are still representing their interests.

8. At no time in the course of your petitioner's case against the defendants doing business as Winston, Strawn, Black & Towner, did Judge Sullivan or the defendants disclose to petitioner their said relationship, which disclosure would have placed petitioner in position to seek respondent Judge Sullivan's removal for self-interest. On July 1, 1955, Judge Sullivan entered a Summary Order therein against your petitioner and in

favor of the defendants by applying the doctrine of absolute privilege. It is elementary that the doctrine of absolute privilege can never be applied legally to libelous matters unless they are published in court pleadings, and then the application is restricted. Therefore, Judge Sullivan's patently illegal application of the doctrine therein supports petitioner's charge of the Judge's self-interest, because the publications complained of were admittedly made in the course of proceedings before the American Bar Association, a voluntary association.

9. On your petitioner's appeal to this Honorable Court at No. 11595, this Court would not affirm on the ground of absolute privilege but did so on a different ground—lack of publication (273 F.2d 790). In effect this Court reversed the application of the doctrine of absolute privilege, and then affirmed on a ground for whch there was no record support, because not only had the defendants below admitted publication but there had never been a hearing below on that issue. The only forum wherein to establish a record on which to base the said issue is the District Court. Appellate Courts are without facilities and jurisdiction to make a record on issues. See United States of America v. Shotwell Manufacturing Company, Harold E. Sullivan, et al., 355 U.S. 233 (December 16, 1957), in which case the Supreme Court of the United States decided that the District Court is the only forum wherein to establish the record on issues, and in the absence of such record in the District Court, that particular issue cannot be the subject of an appeal in the Court of Appeals or of review in the Supreme Court. Furthermore, in support of the point that the jurisdiction of the Court of Appeals is exclu-

sively appellate and that it is not the function of the Court of Appeals to assume the powers of the District Court. See Ralston Purina Co. v. Novak, 111 F.2d 631, Stephenson v. Equitable Life Assur. Soc. of U. S., 97 F.2d 406, and Publicity Building Realty Corp., et al., v. Hannegan, et al., 139 F.2d 583. Furthermore, the denial of certiorari by the Supreme Court at No. 788 October Term, 1956 (353 U.S. 911), "Does not imply approval of the decision for which review is sought or of its supporting opinion". See Elgin, Joliet & Eastern Rwy. Co. v. Gibson, 7 CCA, 355 U.S. 897 (1957), citing Brown v. Allen, 344 U.S. 443. Your petitioner's last pleading filed in the Supreme Court in said matter was denied on April 28, 1958.

10. Promptly after the Supreme Court's denial of relief to petitioner, he served Notice upon defendants in the said action below before Respondent Judge Sullivan that he would present his Motion for Leave to Amend Complaint on June 13, 1958. The Notice of Motion, the Motion for Leave to Amend Complaint and the Amendment to the Complaint were lodged with Respondent Roy H. Johnson, Clerk, for filing on May 14, 1958. Nevertheless, the respondent clerk did not mark them filed and did not make docket entries of them, but simply forwarded them to Respondent Judge Sullivan for disposition. The Amendment was filed in strict compliance with the applicable law and Rule 15(a), which provides for the allowance of course of one amendment prior to trial, as a matter of right. It is evident herein that there has been no trial nor has there been a hearing on any issue except absolute privilege. Furthermore, the amendment to the complaint conforms to the opinion of this Honorable Court which indicated that the publication

was made by the defendants through and by the agency of the American Bar Association. Under Rule 15, therefore, leave of court was not even required. The amendment was filed timely because under the Rules and the applicable law there is no limitation of time for amendments, the only requirement being due diligence; and the plaintiff could hardly have been more duly diligent because the amendment was filed within two weeks after notification of denial in the Supreme Court. Furthermore, such an amendment is allowable under the law at any time, even after judgment.

11. While petitioner's said Motion for Leave to Amend Complaint was pending, he served Notice upon defendants in the said action below before respondent Judge Sullivan that he would present his Motion for Change of Venue on June 12, 1958. The Notice of Motion and the Motion for Change of Venue were lodged with respondent Roy H. Johnson, Clerk, for filing on May 29, 1958, and are attached hereto, made part hereof and marked Exhibit A. Nevertheless, the respondent clerk did not mark them filed and did not make docket entries of them, but simply forwarded them to respondent Judge Sullivan for disposition.

12. On June 12, 1958 your petitioner appeared before respondent Judge Sullivan to present the Motion for Change of Venue, Exhibit A hereof, as well as the said Motion for Leave to Amend Complaint and R. Lawrence Storms, Esquire, of Winston, Strawn, Smith & Patterson, record counsel for the defendents therein also appeared on Notice. Respondent Judge Sullivan stated from the bench that the Court no longer had jurisdiction and that he would not enter orders on the

motions. Lodged herewith for the information of this Honorable Court is a transcript of the said proceedings before Respondent Judge Sullivan. This Court's attention is particularly directed to page 4 thereof whereon the following statement of Respondent Judge Sullivan appears: "THE COURT: No order on both motions; no jurisdiction." Respondent Judge Sullivan's excuse for his refusal to enter an Order, "no jurisdiction", is as fantastic beyond belief as his decision, "no order," is illegal beyond comprehension.

13. It is elementary that Respondent Roy H. Johnson, Clerk, had no alternative upon receipt of the said Notices and Motions but to mark them filed and to make docket entries of them in advance of forwarding them to Respondent Judge Sullivan. Prior to presentation of the said Motions to Respondent Judge Sullivan your petitioner requested the Respondent Clerk to mark the said Notices and Motions filed and to make docket entries of them, but he stated that he would do nothing until conferring with Respondent Judge Sullivan. After your petitioner's attempted presentation of the Motions to Respondent Judge Sullivan he was notified by Respondent Clerk that Respondent Judge Sullivan orally ordered the Clerk not to mark the papers filed and not to make docket entries of them for lack of jurisdiction.

14. It is elementary that Respondent Judge Sullivan in refusing to consider or enter an order on petitioner's said Motions has acted in violation of the federal Rules of Civil Procedure and the applicable law. Under the rules he was bound to give full consideration to the Motions and having done so, he was bound to enter Orders thereon. District Court Judges are bound by

the federal Rules of Civil Procedure as by an Act of Congress. See Foltz v. Moore-McCormack Lines, Inc., 19 F.R.D. 301 (1956), wherein it was held analogously that the motion must be granted because Congress gave the federal Rules of Civil Procedure the force and effect of a statute (Cf. 28 U.S.C. sec. 2072).

15. The respondent Judge's faliure to exercise his power under the Rules legally has subjected him to the supervisory control of this Honorable Court through the instant petition. Support for this contention is found in the case of LaBuy, United States District Judge, v. Howes Leather Co., Inc., et al., 352 U.S. 249 (1957), affirming 226 F.2d 703 (7 CCA), wherein the Supreme Court of the United States held in the majority opinion. (pp. 259-260) by Mr. Justice Clark, "Supervisory control of the District Courts by the Courts of Appeals is necessary to proper judicial administration in the Federal system; and the All Writs Act, 28 U.S.C. sec. 1651(a), confers on the Courts of Appeals the discretionary power to issue extraordinary writs in exceptional circumstances such as exist herein."

16. It is respectfully submitted that just as respondent Judge Sullivan has subjected himself to the supervisory control of this Honorable Court, this Court's denial of this petition would likewise subject it to the Supreme Court's power of supervision as set forth in Rule 19 of the Supreme Court of the United States setting forth considerations governing review on certiorari, wherein paragraph 1(b) provides for certiorari where a court of appeals has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as

to call for an exercise of the Supreme Court's power of supervision.

17. In view of the foregoing, it is respectully submitted that respondent Roy H. Johnson, Clerk, should be directed to mark your petitioner's said Motion for Leave to Amend Complaint filed as of May 14, 1958, and his said Motion for Change of Venue filed as of May 28, 1958, and to make docket entries of them; and further, respondent Judge Sullivan should be ordered and directed to set a Hearing on your petitioner's said Motion for Change of Venue, and after full hearing and consideration thereof, to enter an Order thereon under the federal Rules of Civil Procedure and the applicable law.

18. Your petitioner is without other specific and adequate remedy at law.

WHEREFORE, petitioner prays that this Honorable Court grant a Rule directed against the respondent, Roy H. Johnson, to show cause, if any, why a Writ of Mandamus should not be issued directing him to mark plaintiff-petitioner's Notice and Motion for Leave to Amend Complaint and the annexed Amendment to the Complaint filed May 14, 1958, and to mark plaintiff-petitioner's Notice and Motion for Change of Venue, Exhibit A hereof, filed May 29, 1958; and to enter the appropriate Docket Entries thereof at Civil Action No. 54 C 681 in the United States District Court for the Northern District of Illinois, Eastern Division; and that this Honorable Court grant a Rule directed against the respondent, Philip L. Sullivan, to show cause, if any, why a Writ of Mandamus should not be issued directing him to set a Hearing on plaintiff-petitioner's Motion for Change of Venue and, after full hearing and considera-

tion thereof to enter an Order thereon under the federal Rules of Civil Procedure and the applicable law, at Civil Action No. 54 C 681 in the United States District Court for the Northern District of Illinois, Eastern Division.

S/ PAUL GINSBURG
Petitioner

AFFIDAVIT

Commonwealth of Pennsylvania)
County of Allegheny) ss.:

Before me, a Notary Public in and for said County and State, personally appeared Paul Ginsburg, petitioner above named, who being duly sworn according to law deposes and says that the facts set forth in the foregoing petition are true and correct.

S/ PAUL GINSBURG

Sworn to and subscribed before me this 20th day of June, 1958.

S/ BINA B. ZEIDMAN

Bina M. Ziedman, Notary Public
Pittsburgh, Allegheny County
My commission expires February 5, 1959.

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

PAUL GISNBURG, Plaintiff,
v.
JOHN D. BLACK, ET AL., Defendants.

Civil Action
No. 54 C 681

NOTICE OF MOTION

YOU ARE HEREBY NOTIFIED that on Thursday, the 12th day of June, 1956, at the opening of Court in the forenoon, or as soon thereafter as plaintiff can be heard, in the United States Court House at Chicago, Illinois, plaintiff will appear in the Court Room assigned to Hon. Philip L. Sullivan and, then and there, present to the said Judge the following:

MOTION FOR CHANGE OF VENUE

Plaintiff moves that this Honorable Court, in the interest of justice, enter an Order transferring the above entitled action from this District to the United States District Court for the Western District of Pennsylvania where the plaintiff resides, or, in the alternative, to the United States District Court for the District of Columbia or the United States District Court for the Southern District of New York where none of the parties resides; and in support hereof avers:

1. The Judge of this Honorable Court to whom said action has been assigned, Hon. Philip L. Sullivan, is unqualified because of his self-interest; and is prejudived in favor of the defendants and against the plaintiff.

2. Because of Judge Sullivan's prestige, influence and standing in said District, the plaintiff will be de-

prived of an impartial, unprejudiced, fair and proper tribunal and atmosphere in which lawful disposition of his Complaint may be anticipated.

3. A transfer of this cause to another District such as the Western District of Pennsylvania where the plaintiff resides, or the District of Columbia or Southern District of New York where none of the parties resides; but which Districts are comparable to this District, would promote the principles and rights of litigants to fair and impartial administration of justice and an atmosphere untained by prejudice as herein set forth.

4. In support hereof is attached hereto and marked Exhibit "A" as part hereof, a copy of plaintiff's last pleading filed in this matter at No. 788 October Term, 1956, in the Supreme Court of the United States (denied on April 28, 1958), entitled "Motion For Leave To File Supplemental Record and Second Petition For Rehearing Out of Term Time; And, In the Alternative, Motion To Remand". NOTE: Instead of attaching the said cumbersome Exhibit, reference is hereby made to the same appendix which is of record in this Honorable Court at No. 12256.

WHEREFORE, plaintiff respectfully moves that this Honorable Court enter an Order transferring the cause to an appropriate District.

S/ PAUL GINSBURG
Plaintiff
Carlton House
550 Grant Street
Pittsburgh 19, Pa.

Dated: 28 May 1958

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago 10, Illinois

June 25, 1958

Before
Hon. Philip J. Finnegan,
Hon. John S. Hastings,
Hon. W. Lynn Parkinson.

PAUL GINSBNRG
No. 12365 v.
HON. PHILIP L. SULLIVAN, ET AL.

Petition for Writ Of Mandamus

ORDER

The Court is of the opinion that the facts alleged and set forth in the petition filed June 21, 1958, do not justify a hearing; consequently we refuse to issue a rule to show cause why a writ of mandamus should not issue. Petition for writ of mandamus is hereby DENIED.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
1212 Lake Shore Drive
Chicago 10

Kenneth J. Carrick
Clerk

March 28, 1958

Hon. Philip L. Sullivan
United States District Judge
United States Court House
Chicago 4, Illinois

Hon. Michael L. Igoe
United States District Judge
United States Court House
Chicago 4, Illinois

Mr. Paul Ginsburg
550 Grant Street
Pittsburgh 19, Pennsylvania

Mr. Robert Tieken
United States Attorney
450 U. S. Court House
Chicago 4, Illinois

Mr. George B. Christensen
Attorney at Law
38 So. Dearborn Street
Chicago, Illinois

Mr. Roy H. Johnson
United States District Court
Chicago 4, Illinois

Re: Paul Ginsburg v. Hon. Philip L. Sullivan and Hon. Michael L. Igoe, United States District Judges, No. 12256

Gentlemen:

Enclosed is certified copy of the order of this Court denying petition for writ of mandamus.

Very truly yours,

KENNETH J. CARRICK
Kenneth J. Carrick, Clerk

KJC:hmm
Enc.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DISTRICT

PAUL GINSBURG, Plaintiff,
v.
JOHN D. BLACK, ET AL., Defendants.
No. 54 C 681

Transcript of Proceedings

had in the above-entitled cause before the Hororable Philip L. Sullivan, Chief Judge of said Court, in his court room in the United States Court House at Chicago, Illinois, on Thursday, June 12, 1958, at 10:00 o'clock a. m.

APPEARANCES:

MR. PAUL GINSBURG
(Carlton House, Pittsburgh 19, Pa.),
Pro se;

MESSRS. WINSTON, STRAWN, SMITH & PATTERSON
(Suite 1400, 38 S. Dearborn Street,
Chicago 3, Ill.), by
R. LAWRENCE STORMS, ESQ.,
on behalf of Defendants.

Thereupon the following proceedings were had herein:—

The Clerk: 54 C 681, Paul Ginsburg v. John D. Black, et al., motion for change of venue.

Mr. Ginsburg: Good morning, your Honor.

The Court: This case I know is the one I got a letter on. You represent yourself and you are from Philadelphia?

Mr. Ginsburg: Pittsburgh, your Honor.

The Court: What jurisdiction do I have over any of it?

Mr. Ginsburg: Well, your Honor, there is also pending a motion for leave to file an amendment to the complaint.

The Court: Where is that pending?

Mr. Ginsburg: In this court, your Honor.

The Court: When?

Mr. Ginsburg: I sent it in about a month ago, for filing.

The Court: Was there a notice served or what?

Mr. Ginsburg: A notice was served for presentation of that for tomorrow.

The Court: What jurisdiction do I have?

Mr. Ginsburg: Your Honor, I would like to explain it to you. This court dismissed the action on it by applying the doctrine of absolute privilege.

The Court: Yes.

Mr. Ginsburg: The Court of Appeals affirmed the judgment of dismissal.

The Court: On a different ground.

Mr. Ginsburg: But, on a different ground. Therefore, the Court of Appeals, in effect, held that there is no absolute privilege applicable to this case.

The Court of Appeals took the position that the affirmance should be based on lack of publication by the

defendants. The Court of Appeals took the position that if there were publication, it would be by or through the American Bar Association which distributed everything that I sent to them for distribution, and the defendants, too.

Now, the Court of Appeals had—

The Court: Let me see. First, what is the position of the defendants?

Mr. Storms: If the Court please, I am here this morning as a courtesy to the Court and not representing the defendants. Judgment was entered in this cause.

The Court: What do you mean by "as a courtesy to the Court?

Mr. Storms: I am here in response to a motion. I am taking no affirmative action because there is nothing before the Court. I am not representing the defendants this morning.

The Court: It is your contention there is nothing before the Court?

Mr. Storms: Exactly, sir. Judgment was entered in July, 1955.

The Court: No order on both motions; no jurisdiction.

Mr. Ginsburg: Your Honor, may I call your attention to the point—

The Court: I get your point.

Mr. Ginsburg: (Continuing) — under Rule 15 of the Federal Rules of Civil Procedure, I am entitled to

amend once as a matter of course prior to trial. There has never been a trial.

The Court: After the Supreme Court of the United States has passed on it?

Mr. Ginsburg: Oh, yes.

Mr. Storms: He has been in the Supreme Court at least twice.

The Court: That is the order, no order.

Mr. Ginsburg: Your Honor, the Clerk of the Court has not yet docketed the filing of these motions. Can I tell him he is to docket them so there is a record of docket entry?

Mr. Storms: There is no case before this Court in which these papers can be filed.

The Court: That is the position of counsel?

Mr. Storms: Yes.

Mr. Ginsburg: Your Honor, under the law and the practice, the Clerk has no alternative but to file.

The Court: There is no order on that. There is no order on this. Call the next case.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 372

PAUL GINSBURG,

Petitioner,

vs.

HON. PHILIP L. SULLIVAN, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION, AND HON. ROY H. JOHNSON, CLERK OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION,

Respondents.

ANSWER TO PETITION FOR CERTIORARI.

GEORGE B. CHRISTENSEN,
THOMAS A. REYNOLDS,
Attorneys for Respondents.

WINSTON, STRAWN, SMITH & PATTERSON,
38 South Dearborn Street,
Chicago, Illinois,
Of Counsel.

THE LAWYERS PRINTING CO., CHICAGO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 372.

PAUL GINSBURG,

Petitioner,

vs.

HON. PHILIP L. SULLIVAN, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION, AND HON. ROY H. JOHNSON, CLERK OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION,

Respondents.

ANSWER TO PETITION FOR CERTIORARI.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petition for certiorari is founded upon the assumption that the Court of Appeals for the Seventh Circuit should have issued a writ of mandamus to the District Court for the Northern District of Illinois, Eastern Division, requiring it to receive, on June 12, 1958, and to pass upon an amendment to a complaint in a case (*Ginsburg v. Black, et al.*) in which final judgment had been entered against petitioner on July 1, 1955, and subsequently affirmed by the Court of Appeals for the Seventh Circuit in 237 F. 2d 790. Certiorari therein was denied by this Court May 6, 1957

(353 U. S. 911, 951). Subsequent to the denial of certiorari petitioner filed sundry and scandalous petitions in the nature of petitions for rehearing, both in and out of term time, all of which were denied by this Court. In the face of as final an adjudication as our law provides, petitioner endeavored to revive the case in the District Court with an amended complaint. That Court had long since lost jurisdiction. No case was before it in which an amendment could be made.

The Court of Appeals properly denied mandamus, and it is respectfully submitted that no cause for certiorari exists.

Respectfully submitted,

GEORGE B. CHRISTENSEN,
THOMAS A. REYNOLDS,
Attorneys for Respondents.

WINSTON, STRAWN, SMITH & PATTERSON,
38 South Dearborn Street,
Chicago, Illinois,
Of Counsel.

October 27, 1958.

FILE COPY

Office-Supreme Court, U.S.
FILED
NOV 2
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

NO. 372

PAUL GINSBURG, Petitioner

v.

HON. PHILIP L. SULLIVAN, Judge of the United States District Court for the Northern District of Illinois, Eastern Division, and HON. ROY H. JOHNSON, Clerk of the United States District Court for the Northern District of Illinois, Eastern Division

PETITIONER'S REPLY BRIEF

PAUL GINSBURG pro se
Counsel for Petitioner

Carlton House
550 Grant Street
Pittsburgh 19, Pa.

SMITH BROS. CO. INC., LAW PRINTERS, 434-436 BLVD. OF ALLIES, PITTSBURGH 19, PA.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

NO. 372

PAUL GINSBURG, Petitioner

v.

HON. PHILIP L. SULLIVAN, Judge of the United States District Court for the Northern District of Illinois, Eastern Division, and HON. ROY H. JOHNSON, Clerk of the United States District Court for the Northern District of Illinois, Eastern Division

PETITIONER'S REPLY BRIEF

The petitioner makes this reply to the "Answer To Petition For Certiorari" filed for the respondents just as if it were a Brief In Opposition timely filed under the Rules.

The "Answer" of the respondents was made, of course, by the same attorneys who are the defendants in petitioner's civil action for damages in the District Court (App. 1-2, 13-14) before respondent Judge Philip L. Sullivan; and who prior to the pre-trial conference before Judge Sullivan, wherein they appeared as defendants pro se, started to represent the interests of the Judge's brother, Harold E. Sullivan, Esquire, *after* his appeal was filed from convictions of income tax evasion, and on whose behalf they made the principal argument in the Court of Appeals and the only argument in this Honorable Court at No. 1 October Term, 1957 (App. 3, 15);

and who still are representing the interests of said Judge's brother in that case on remand to the District Court as well as in other criminal cases in which the Judge's brother has been indicted. After these persuasive attorneys prevailed upon the lower courts in Chicago to render decisions which slaughtered the Federal Rules of Civil Procedure and the law of the land, they now presume to reappear before this Honorable Court to defend the respondents' actions which are inexcusable, indefensible and judicially obnoxious beyond belief in this most western of the Western Democracies. Not even ignorance could be accepted as a defense, as it does not take a member of the bar to know how wrong and illegal their actions have been. Laymen readily understand it. It is respectfully submitted that this Honorable Court should hasten to deordorize these current slaughterhouse cases from Chicago before said cases get cited by others for a similar escape from their liabilities imposed by law.

The reappearance of these attorneys herein gives added weight to petitioner's prior contention that respondent Judge Sullivan should have disqualified himself (App. 23-24). Certainly the reasons of Mr. Justice Frankfurter for recusing himself and declining to take part in the consideration or decision of the case of *Public Utilities Commission of the District of Columbia, et al., v. Pollak, et al.*, 343 U. S. 451, should have applied *a fortiori* to Judge Sullivan below. In said case Mr. Justice Frankfurter stated (466-7), "But it is also true that reason cannot control the subconscious influence of feelings of which it is unaware. When there is ground for believing that such unconscious feelings may oper-

ate in the ultimate judgment, or may not unfairly lead others to believe they are operating, judges recuse themselves. They do not sit in judgment. They do this for a variety of reasons. The guiding consideration is that the administration of justice should reasonably appear to be disinterested as well as be so in fact". Since Judge Sullivan was actually conscious of the fact that his counsel herein, who were petitioner's defendants before His Honor, were then and still are entrusted with the freedom of the Judge's brother (App. 23-24) from sentencing to imprisonment, payment of fines, subsequent disbarment, etcetera, could anyone be so naive as to believe that Judge Sullivan was not even having subconscious or unconscious feelings in the matter?

This is no time for the respondents to invoke (p. 2) what "our law provides", because our law is all against them. They never invoked our law before, when they rendered those Chicago decisions. Contrarily, they butchered our law in Chicago. When they refer (p. 2) to the "final" adjudication below, they pray that this Honorable Court should enter a conflict with its decision in the case of Judge Sullivan's brother, *United States of America v. Shotwell Manufacturing Co., Harold E. Sullivan, et al.*, 355 U. S. 233, wherein this Court remanded the case to the District Court for further proceedings after a "final" adjudication. Therefore, it is the petitioner who invokes our law, *again*, and our law leaves this Honorable Court no alternative but to grant certiorari.

Even assuming *arguendo* that the "Answer" of respondents be true instead of false, tenable instead of untenable and supportable instead of insupportable, the

"answer" does not contain any legal defense whatever for the respondent Judge, and does not even attempt to defend the respondent Clerk's refusal to file and make Docket Entries of petitioner's pleadings (App. 10-11, 23-24). What more serious and appalling departures from the usual and accepted course of judicial proceedings could confront this Honorable Court to provoke the exercise of its powers of supervision over the lower courts? Therefore, the "Answer" must be taken as a mere hope that certiorari be denied and actually as a real admission by the respondents that certiorari should be granted.

Respectfully submitted,

PAUL GINSBURG,
Counsel for Petitioner

Office-Supreme Court
NOV
Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

NO. 372

PAUL GINSBURG, Petitioner

v.

HON. PHILIP L. SULLIVAN, Judge of the United States District Court for the Northern District of Illinois, Eastern Division, and HON. ROY H. JOHNSON, Clerk of the United States District Court for the Northern District of Illinois, Eastern Division

PETITION FOR REHEARING

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

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PAUL GINSBURG, Petitioner

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PETITION FOR REHEARING

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petition for rehearing of Paul Ginsburg respectfully represents:

1. On November 10, 1958, upon consideration of the Petition for Writ of Certiorari, respondents' Answer to Petition for Certiorari and petitioner's Reply Brief, this Honorable Court denied the petition.

2. Involved herein is the right of petitioner to the protection and enforcement of his civil rights as guaranteed by the Constitution and laws of the United States. His said rights include, but are not limited to, the right to work and earn a living in one's chosen occupation and profession, the right to be paid compensation for work done and services rendered in one's chosen occupation and profession, and, upon the deprivation of the said

rights, the right to litigate with due process of law to protect and enforce them. This Court's said denial of certiorari has been construed in line with the popular misconception that the only civil rights which exist and are the subject of federal protection and enforcement are the two rights actively litigated lately by political groups which rights are peculiar to some Negroes in some Southern States: the right to vote and the right to attend an integrated school. Has the popular misconception become the Law of the Land?

3. Primarily involved herein is petitioner's right to litigate with due process of law to protect and enforce his other rights. As a matter of record it is manifest that petitioner was denied his fundamental right to a day in Court in advance of the District Court's illegal entry of summary judgment; then, upon his legal reopening of the action therein, the respondent Clerk refused to file and make appropriate Docket Entries of the pleadings and the respondent Judge refused to enter Orders thereon. **The one pleading which Judge Sullivan refused to order filed or to act upon** was a Motion for Leave to Amend Complaint in order to conform the complaint to the Opinion of the Court of Appeals; and, the **other pleading which Judge Sullivan refused to order filed or to act upon** was a Motion for Change of Venue in the interests of justice. Petitioner's experiences in the District Court particularly under Hon. Philip L Sullivan, have convinced him that he cannot expect compliance with the Federal Rules of Civil Procedure and the applicable law; just as he cannot expect the Court of "Appeals" to enforce same therein; however, in this particular case the petitioner came before this Honorable Court feeling so safe and confident, not only under

the Constitution and laws but also this Court's powers of supervision. Under such circumstances your disappointed petitioner cannot be at all described as naive or unrealistic, because even the most seasoned and hardened practitioner would express surprise at this Court's denial of relief herein, particularly at a time when the ink is hardly dry on its opinions in *Cooper, et al., v. Aaron, et al.*, at No. 1 August Special Term, 1958.

4. This Court's denial of the instant petition and its predecessor petition at No. 788 October Term, 1956, as well as its denial of your petitioner's Petition for Writ of Certiorari at No. 834 October Term, 1957, in an action brought under the Fourteenth Amendment and the Civil Rights Acts, is actually *a public as well as a private problem.* Although the problem is obvious, it did not become real until the decisions in your petitioner's said cases were made known to all concerned in the litigation involving Central High School at Little Rock, Arkansas, through petitioner's letter dated September 27, 1958, a copy of which is annexed hereto. The problem is the enforcement of the Law of the Land. The question then arose as to what is the Law of the Land. Prior to petitioner's disclosure as aforementioned President Eisenhower thought and Arkansas Governor Faubus feared that this Court's pronouncements in *Cooper et al., v. Aaron, et al.*, at No. 1 August Special Term, 1958, were the Law of the Land. After petitioner's disclosure, however, their advice changed. A serious doubt arose. Perhaps the Law of the Land was evidenced in this Court's decisions in the three aforesaid cases of your petitioner. If so, then it is the Law of the Land that White citizens who are sincerely pro-American cannot secure the protection and enforcement of any of their

federal constitutional and civil rights "guaranteed" by the Fourteenth Amendment and the Civil Rights Acts. Would it not necessarily follow that the Civil Rights Acts are special legislation and hence unconstitutional?

5. Last year the Attorney General of the United States informed President Eisenhower that this Honorable Court enforces and protects the federal constitutional and civil rights for all alike regardless of race, color and creed; and then advised the President to dispatch the Military to Little Rock to enforce the civil rights of nine children, the cost of which is estimated at $5,000,000.00. This year your petitioner notified President Eisenhower that he was misinformed and ill advised, since which time the President has not lifted a finger let alone sent a soldier. Since the entry of this Court's decision at No. 1 August Special Term, 1958, hardly a week has gone by that President Eisenhower has not been publicly criticized for not actively enforcing this Court's mandate; but little do those uninformed critics know how the President's hands are tied. His inactivity is through no fault of his own. The President of the United States of America is sincerely interested in enforecement of all civil rights; but he has recently decided, being fully informed, that he will have no part of it on a discriminatory basis.

6. Can the Federal Government of President Lincoln now effectively tell a State Government of the South, "Do as I say, but not as I do"? Can Governor Faubus sincerely be expected to accept the Federal mandate from Washington and to reject his State mandate from the People of Arkansas, on orders of "Do as I Say" justice? Is the Federal Government in the North legally entitled to force a State Government in the South to

clean up its backyard before it has done so in its own? Is not government by example the the most effective and the easiest to enforce?

7. At the bottom of our problem could very well be an actual minority rule through pressures. Although we technically are governed by majority rule, through dilutions and squeezes from within and without we have become subjected to the minority rule and the clearest manifestation of this point has become evidenced in the Law of the Land as dispensed in recent years. In *Cooper v. Aaron, supra,* Mr. Justice Frankfurter conceded in his extra concurring Opinion that we all have the right to criticize. In view of this Court's decisions in petitioner's cases, he feels that the right to criticize is the only right he has left and seeks to exercise it herein for what it is worth. Petitioner indeed has not been allowed the right to know. Do we have more democracy and freedom under minority rule, or less? Just as your petitioner is justified in wondering if Liberals have become bigoted towards Conservatives, could not Governor Faubus now be heard to query, Who is bigoted now? Would it not be a blessing in disguise, if the minority rule were arrested for speeding before an impending crash that might wreck the vehicle?

8. A long series of costly disappointments during the past several years in the name of the Law of the Land has impelled your petitioner to utter this last word through the instant Petition for Rehearing, knowing full well that although Rule 58 provides for rehearing, it is merely illusory as a right and positively atrophic as a remedy.

9. It is respectfully submitted that another popular misconception should be corrected, and the miscon-

ception is that our Nation is a "Democracy". This Court knows that our Nation is a Republic, the distinction being that the rights of minorities in a Republic are protected by Constitutional guarantees, whereas in a Democracy there is simply majority rule. Therefore, in laying down the Law of the Land, this Honorable Court is bound to protect the rights of the majority as well as the rights of minorities, lest it be criticized for being undemocratic. It necessarily follows that this Court is bound to protect and enforce the guaranteed rights of the rich as well as the poor, the good as well as the bad, the Christian as well as the Atheist, the white as well as the colored, the anti-communist and well as the Communist, and the gentleman as well as the gangster. Therefore, this Court has no alternative but to protect and enforce all the rights of which your petitioner has been deprived as set forth in the petitions filed in his three aforementioned actions in this Court.

Wherefore, your petitioner prays that this Honorable Court grant a rehearing to prevent a serious failure of justice herein, and further to obviate the need for a subsequent proceeding by your petitioner.

PAUL GINSBURG,
Counsel for Petitioner.

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay; and that it is restricted to the grounds specified in paragraph 2 of Rule 58.

PAUL GINSBURG,
Counsel for Petitioner.

PAUL GINSBURG
ATTORNEY-AT-LAW
Carlton House
Pittsburgh 19, Pa.

His Excellency, Dwight David Eisenhower,
The President of the United States of America
The White House
Washington, District of Columbia

Hon. William P. Rogers
Attorney General of the United States
Department of Justice, Washington, D. C.

Senator John L. McClellan
Senate Judiciary Committee
Senate Office Building, Washington, D. C.

Hon. D. Malcolm Anderson
Criminal Division, Department of Justice
Washington, D. C.

Hon. Orval E. Faubus
Governor of Arkansas
Little Rock, Arkansas

Hon. John E. Miller
United States District Court
U. S. Court House, Fort Smith, Arkansas

Hon. Thomas D. McBride
Attorney General of Pennsylvania
Main Capitol Building, Harrisburg, Pa.

Thurgood Marshall, Esquire
10 Columbus Circle, New York 19, New York

Wiley A. Branton, Esquire
119 E. Barraque Street, Pine Bluff, Arkansas

Honorable Sirs:

The enclosed petition in my action against Hon. Philip L. Sullivan and Hon. Roy H. Johnson in the Supreme Court at No. 372 October Term 1958, discloses high federal authority for the right of a court clerk to decide to keep off the record, pleadings which are lodged with him for filing, as well as the right of a judge to refuse to render decisions thereon. The conclusion (pp. 12-13) shows how the denial of my petition could backfire upon the federal government in its controversy with the State of Arkansas, because the Clerks of State and Federal Courts in Arkansas, if so inclined, would then be justified in deciding not to file the government's pleadings to effectuate integration, and if judges condescended to allow a presentation, they could then decide not to render decisions thereon; all denying due process of law, the right of appeal and even the right to litigate.

The denial of my petition against Horace Stern, et al., at No. 834 October Term 1957 by the Supreme Court could be used as authority for the point that members of the judiciary are not liable in suits under the Civil Rights Acts, thus permitting State Judges of Arkansas, so inclined, to deprive residents of that State of their civil rights without any fear whatever of being brought to justice. My prior suit against Horace Stern, et al., recently reopened in the District Court for the Western District of Pennsylvania at Civil Action No. 12643 is also authority for that point in spite of the opinion of Chief Judge Wallace S. Gourley expressed therein that the actions of the defendants were "violative of basic concepts of justice".

The foregoing samples of repeated deprivations of civil rights in the North as well as the right to litigate to secure the protection and enforcement thereof, reflect the Government's discriminatory, erroneous, political policy of protecting and enforcing only the right to vote and the right to attend an integrated school. The Government overlooks, ignores and even considers business as usual, daily deprivations of the right to work and earn a living in one's chosen occupation or profession, the right to compensation for work done or services rendered therein, and upon deprivation of those rights, the right to litigate with due process of law to protect and enforce those rights. That is why I testified before the Senate Committee on the Judiciary against confirmation of Hon. W. Wilson White to head the Civil Rights Division of the Department of Justice. Although the Department Order of December 9, 1957, creating the Division, expressed the purpose of enforcing all federal civil rights statutes, Mr. White would not even investi-

gate any violations except those peculiar to Negroes of the South. It was my position then that if Mr. White were correct about his duties, the Civil Rights Division should be abolished for being based upon special legislation which is unconstitutional. It is my legal opinion and I advocate that the Federal Civil Rights Acts were enacted for all of us in the United States regardless of race, color or creed. The contrary opinion of the Attorney General of the United States would render them special legislation for the benefit of Negroes in the South only and hence unconstitutional. It necessarily follows that if said Civil Rights Division is not abolished, its name should be corrected to Political Action Division.

The fact that Mr. White advised the President to send troops into Arkansas at an estimated cost of $5,000,000.00 to protect the civil rights of nine children, and would not even investigate the deprivations of my rights at no cost, was most distressing. To show the insincerity of political advocates of civil rights on a discriminatory basis, I explained that the Judges in the North who deprived me of my civil rights were not all white. Two Negro jurists, who were entrusted with the protection and enforcement of my civil rights and deprived me thereof, are Circuit Judge William H. Hastie of the United States Court of Appeals for the Third Circuit sitting at Philadelphia and Justice Harold A. Stevens of the Supreme Court of the State of New York sitting at New York City.

Because I am white and anti-Communist, and hence do not qualify for the powerful support of the National Association for the Advancement of Colored People and the American Civil Liberties Union, must I remain the Forgotten Northerner of the Unconstitutional Fifties?

Having already suffered illegal deprivations of my good name, fame, reputation and millions of dollars, must that be followed ad infinitum by contemptible ridicule of my courageous attempts to litigate alone with due process of law under the Constitution, the procedural rules and the law of the land? Did the inflationary spiral in our economy have to be accompanied by the deflationary one in our administration of justice?

I have endeavored to take no sides in the political issues involved, but to express to both sides the facts which I know, as an independent American who believes that the issue of civil rights should not be one for the North against the South or the Republicans against the Democrats, but one which should be considered indivisibly by all of us as a national problem to the end that we shall be able to command the respect of foreign nations as well as of ourselves.

Respectfully submitted,

PAUL GINSBURG
Carlton House
Pittsburgh 19, Pa.

27 September 1958

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

NO. 372

PAUL GINSBURG, Petitioner

v.

HON. PHILIP L. SULLIVAN, Judge of the United States District Court for the Northern District of Illinois, Eastern Division, and HON. ROY H. JOHNSON, Clerk of the United States District Court for the Northern District of Illinois, Eastern Division

On Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION TO CONSOLIDATE WITH PROCEEDINGS AT NO. 788 OCTOBER TERM, 1956, AND TO REMAND

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

NO. 372

PAUL GINSBURG, Petitioner

v.

HON. PHILIP L. SULLIVAN, Judge of the United States District Court for the Northern District of Illinois, Eastern Division, and HON. ROY H. JOHNSON, Clerk of the United States District Court for the Northern District of Illinois, Eastern Division

On Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION TO CONSOLIDATE WITH PROCEEDINGS AT NO. 788 OCTOBER TERM, 1956, AND TO REMAND

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioner, Paul Ginsburg, respectfully moves this Honorable Court:

To vacate all of its Orders entered herein and to vacate all of its Orders entered in his companion proceeding in this Court against John D. Black, et al., at No. 788 October Term, 1956 (*United States of America, Petitioner, v. The Ohio Power Company*, 353 U.S. 98, 1957);

Then to consolidate that proceeding with this one, and grant the consolidated petitions for writ of certiorari;

And thereupon to remand (*United States of America, Petitioner, v. Shotwell Manufacturing Company, Harold E. Sullivan, et al.*, 355 U. S. 233, 1957, citing and relying upon *Communist Party v. Subversive Activities Control Board*, 351 U.S. 115, and *Mesarosh v. United States*, 352 U. S. 1) the consolidated proceedings to the District Court at No. 54C681 for trial on the pleadings filed therein as well as the Amendment to the Complaint (App. 11);

And in support hereof avers:

1. On December 15, 1958, the Petition for Rehearing was denied by this Honorable Court.

2. On December 31, 1958, since said denial of rehearing, a decision was entered in the Court of Appeals for the Third Circuit which conflicts with the decision of the Seventh Circuit sought to be reviewed herein. Mr. Justice Harlan, in advising lawyers on certiorari in a lecture delivered this month before the Association of the Bar of the City of New York, suggested that the surest way to get a petition for a writ of certiorari granted is to show that the case turns on an issue of federal law as to which there is a conflict of decisions among the lower federal courts.

3. The said decision in the Third Circuit, as yet unreported, is at No. 12,777 in the appeal of *Ada J. Vant and Walter J. Vant, Appellants, v. The Mutual Benefit Life Insurance Company*,—F. 2d—, and the entire Per Curiam Opinion of the Court therein is as follows:

> "When this matter came before us for hearing on appellee's motion to dismiss the appeal and the

countering motion of appellants to remand with instructions, it became apparent that counsel for both parties were addressing themselves, in substantial part at least, to the merits of the issue presented by the appeal. Accordingly, it was stipulated in open court that at the conclusion of argument the case should stand submitted on the merits of the appeal as well as on the motions. In this connection counsel for appellant strongly urged the relevancy of briefs and records on the prior appeal on this case. *Vant v. Mutual Benefit Life Ins. Co.*, 1958, 255 F.2d 263. We have examined and considered these items.

"This litigation is an effort of a widow and her son, beneficiaries of a policy of insurance on the life of their deceased husband and father, to obtain immediate payment of the entire proceeds of this life insurance policy, although the policy itself expressly provided for the payment of interest on the principal sum to the widow during her lifetime and the entire proceeds to the son on her death. Originally, the case was submitted in the trial court on plaintiffs' motion for summary judgment and defendant's motion to dismiss. Final judgment was entered dismissing the complaint. On appeal we affirmed.

"After our remand to the district court the plaintiffs filed an amendment to their original complaint alleging in substance that the defendant is in legal contemplation a trustee of the fund in controversy for the plaintiffs. This theory was not spelled out in the original complaint. Believing that our appellate ruling required the same result

whether the complaint presented a contractual or a trust theory of liability, the district court, on motion, struck this amendment. This appeal followed.

"The district court was correct in its interpretation of the meaning and effect of our decision on the first appeal. It was and is our view that appellants have not alleged or shown justification, whether on a theory of trust or otherwise, for equitable intervention overriding the arrangement made by the insured with the insurance company for the deferment of payment of the proceeds of the insurance policy.

"The motions will be denied and the judgment will be affirmed."

4. In the said case of *Vant v. Mutual, supra*, the identical procedural issue was before the Court as in the instant case. The issue is whether or not, after judgment for defendant on motion and affirmance by the Court of Appeals, the case can proceed further in the District Court by amendment as permitted by the Rules and applicable law. In both cases, the instant case and the *Vant* case, the amendment conformed the Complaint to the Opinion of the Court of Appeals. In the *Vant* case, the Court of Appeals for the Third Circuit decided that the case could proceed further in the District Court procedurally, and then gave consideration to the second appeal on the merits and in connection therewith even "examined and considered" the "briefs and records on the prior appeal". Therein, the appellee's motion to dismiss the appeal for being frivolous and without merit was itself denied, the second appeal obviously being from an appealable Order. Although counsel for the appellee

in the *Vant* case cited. Third Circuit cases in "support" of its insupportable proposition, counsel for the appellants successfully cited the same cases contrariwise. For instance, *Carpenter v. Rohm & Haas Co., Inc.*, 3rd Cir., 1950, 180 F.2d 749, affirming D.C. Del., 9 F. R. D. 535; citing with approval *Maddrix v. Dize*, 61 F. Supp. 946, held that a mandate from a reviewing court is controlling only as to such matters as are within the compass of such mandate, and that the lower court is still free to act as to questions not within the compass of the mandate. Also, in opposition to the notion that there can be only one appeal or mandate to a case, *Butcher & Sherrerd v. Welsh*, 3rd Cir., 1953, 206 F.2d 259, was a mandamus proceeding to vacate an order granting a new trial and further proceedings after that Court had returned three mandates affirming judgment against the defendant, the successful advocate therein being Hon. W. Wilson White, now Assistant Attorney General of the United States in charge of the Civil Rights Division.

5. In the instant case, respondent District Judge Sullivan refused the entry of Orders upon petitioner's Amendment to the Complaint (App. 11) and Motion for Change of Venue (App. 23-24) and even the filing of them, following opposing counsel's misrepresentation that "there is nothing before the Court" (App. 29); and then said jurist stated from the bench, "No order on both motions; no jurisdiction" (App. 29). The Court of Appeals for the Seventh Circuit sanctioned these departures of respondent District Judge Sullivan from the accepted and usual course of judicial proceedings. Patently, the conflict in this case with the decision in the *Vant* case is too obvious to require comment. Furthermore, there

can be no question that the decisions sought to be reviewed herein are not only unconstitutional and otherwise illegal, but also the seed for a dangerous precedent; as distinguished from the decision in the *Vant* case which undoubtedly reaffirms and pronounces the Law of the Land.

6. This Honorable Court is aware of the fact that the "decisions" of the respondent District Judge were unaccompanied by an Opinion, and that no authority therefor was stated from the bench; and further no reasons were given by the Court of Appeals for its failure to exercise its supervisory powers.

7. This proceeding is an outgrowth of the prior one at No. 788 October Term, 1956, and consolidation of the two for remand to the District Court is logical, and necessary to prevent a deprivation of petitioner's federal constitutional and civil rights. It is apparent that petitioner has been denied his right to be heard in advance of judgment.

8. So far as the conflict alleged above is concerned, it should unquestionably be resolved against the unconstitutional and otherwise unlawful decision of the Seventh Circuit involved herein, and in favor of the Third Circuit decision in the *Vant* case which reaffirms and pronounces the Law of the Land.

Wherefore, it is respectfully submitted that the prior proceeding of your petitioner against John D. Black, et al., at No. 788 October Term, 1956, should be consolidated with this proceeding for purposes of remand to the District Court for trial.

PAUL GINSBURG,

Dated: 19 January 1959. Counsel for Petitioner.